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IN THE

Supreme Court of the United States

October Term, 1965

No. ...4731

FREDERICK F. SINGER, individually and as guardian and parent of MICHAEL SINGER, an infant,

Respondents,

AGAINST

ALAN WALKER, doing business under the firm name and style of WALKER'S MINERALS at 799 Lexington Avenue, New York City,

Defendant,

AND

ESTWING MANUFACTURING CO. INC., also known as ESTWING MANUFACTURING COMPANY,

Petitioner.

Petition for a Writ of Certiorari to Court of Appeals of the State of New York and to the Supreme Court of the State of New York, Appellate Division, First Department

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ———

FREDERICK F. SINGER, individually and as guardian and parent of MICHAEL SINGER, an infant,

Respondents,

AGAINST

ALAN WALKER, doing business under the firm name and style of WALKER'S MINERALS at 799 Lexington Avenue, New York City,

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AND

ESTWING MANUFACTURING CO. INC., also known as ESTWING MANUFACTURING COMPANY,

Petitioner.

Petition for a Writ of Certiorari to Court of Appeals of the State of New York and to the Supreme Court of the State of New York, Appellate Division, First Department

The petitioner Estwing Manufacturing Co. Inc. prays that a Writ of Certiorari issue to review an order of the Court of Appeals of the State of New York, dated May 27, 1965 which affirmed an order of the Supreme Court of the State of New York, Appellate Division, First Department, dated May 26, 1964, which latter order reversed an order of the Supreme Court of the State of New York, County of New York entered on November 21, 1963, and from which order (dated May 26, 1964) leave to appeal to the Court of Appeals was granted by order of the Appellate Division, First Department, dated July 16, 1964.

The Opinions Below

The opinion of the Supreme Court of the State of New York, County of New York, has not been officialy reported. The order and opinion are printed in Appendix "A", hereto, pages 12-13. The opinion of the Appellate Division, First Department, of the State of New York, is reported in 21 A. D. 2d 285, 250 N. Y. S. 2d 216 (1965) and both the opinion and order are printed in Appendix "A", pages 14-25, *infra*. The opinion of the Court of Appeals of the State of New York has not been reported as of this date. The order and opinion are printed in Appendix "A", pages 26-56, *infra*.

Jurisdiction

The order of the Court of Appeals of New York was entered on May 27, 1965 (Appendix A, pp. 55-56, *infra*). The order of the Supreme Court, First Department, State of New York, was entered on the 26th day of May, 1964 (Appendix A, pp. 14-15, *infra*). The order of the Supreme Court of the State of New York, County of New York, was entered on the 21st day of November, 1963 (Appendix A, pp. 12-13, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257.

Questions Presented

1. May New York State constitutionally create *in personam* jurisdiction over a non-domiciliary where the non-domiciliary has no agents, servants and/or employees in New York State, no office or facilities of any kind in that State, and where the non-domiciliary's only connection with that State is the mere presence of its product on the shelf of an independent distributor, doing business in the

State of New York, who purchased petitioner's product by forwarding his order directly to petitioner's domicile, to wit: Rockford, Illinois, where the order was processed and shipped f.o.b. Illinois?

2. May New York State constitutionally give retroactive effect to Section 302 of the Civil Practice Law and Rules (which creates *in personam* jurisdiction over a non-domiciliary), who was not subject to the jurisdiction of the Courts of the State of New York at the time of the occurrence?

Statutes Involved

The statutes involved in the instant case are Sections 302 and 10003 of the Civil Practice Law and Rules of the State of New York.*

---

* §302. Personal Jurisdiction by Acts of Non-Domiciliaries

(a) Acts which are the basis of jurisdiction. A Court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the State, if, in person or through an agent, he:

1. transacts any business within the state; or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. owns, uses or possesses any real property situated within the state.

§10003. Pending and Subsequent Proceedings.

This act shall apply to all actions hereafter commenced. This act shall also apply to all further proceedings in pending actions, except to the extent that the court determines that application in a particular pending action would not be feasible or would work injustice, in which event the former procedure applies. Proceedings pursuant to law in an action taken prior to the time this act takes effect shall not be rendered ineffectual or impaired by this act.

Statement

The petitioner is an Illinois corporation engaged in the business of manufacturing hammers, picks and shovels in the State of Illinois (RA6, 7). The petitioner's only plant and office are located in Rockford, Illinois. The petitioner transacts no business in the State of New York and has no employees, officers, bank account, warehouse, telephone, agents or property or any other facility in the State of New York (RA16, 29). All orders for petitioner's merchandise are received, by mail, at Illinois where they are processed and shipped F.O.B. Illinois (RA16, Appendix "A", p. 17).

In the instant case, the defendant Walker (not served in the action) who is an independent distributor of many products (RA6), located in the City of New York, purchased the hammer which allegedly caused the injury to the infant respondent by mailing his order directly to the petitioner to its offices in Rockford, Illinois, where the order was processed and shipped F.O.B. Illinois (Appendix "A", p. 17, *infra*). There was no personal contact or other relationship between the defendant Walker, and the petitioner in this State (Appendix "A', pp. 17, 44, *infra*). Walker's business in New York was not solicited either by the petitioner or by any of petitioner's agents, servants, and/or employees (RA39; Appendix "A", p. 17, *infra*).

On or about February 24, 1960, the respondent's aunt purchased the allegedly defective hammer from the defendant Walker and presented it to the infant respondent, who, on April 17, 1960, took the hammer with him to Trumbull, Connecticut, where he alleges he was injured while using it (RA9, 10; Appendix "A", pp. 17, 44, *infra*).

On two occasions prior to the enactment of Section 302 of the CPLR, respondent served a summons and com-

plaint on petitioner (Appendix "A", pp. 17, 44, *infra*). The two prior services were vacated on the ground that petitioner was not doing business in this State (Appendix "A", pp. 17, 44, *infra*).

Subsequent to the enactment of Section 302 of the CPLR, the respondent served the petitioner in Rockford, Illinois with a summons and complaint, in an action in the Supreme Court, of the State of New York, New York County. The petitioner moved to vacate service on the ground that the Court did not have jurisdiction of the petitioner. The Court (Supreme Court, New York County), vacated the service (Appendix "A", pp. 12-13, *infra*). On appeal to the Supreme Court of the State of New York, Appellate Division, First Department, the order was reversed (Appendix "A", pp. 14-15, *infra*). An application was made to the Appellate Division, First Department for leave to appeal to the Court of Appeals of the State of New York and this application was granted (RA53-55). On appeal to the Court of Appeals of the State of New York, the order of the Appellate Division was affirmed (Appendix "A", pp. 55-56).

The Appellate Division concluded that the petitioner committed a tortious act in the State of New York and sustained jurisdiction solely on that ground (Appendix "A", pp. 16, 17, 25, *infra*). This conclusion was rejected by the Court of Appeals (Appendix "A", pp. 45-46, *infra*). However, the latter determined that the New York courts had jurisdiction because the petitioner transacted business in the State of New York within the meaning of Section 302[a](1) of the CPLR.*

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* It is interesting to note that the Court of Appeals of the State of New York, in a recent decision, *Bryant* v. *Finnish National Airlines*, 15 N. Y. 2d 426 (1965), made a special jurisdictional distinction where tortious acts were committed outside the State. It held that in such

Reasons for Granting the Writ

This case involves novel and substantial questions which should be resolved by this Honorable Court.

In recent years, various states have enacted new legislation devised to expand *in personam* jurisdiction over non-domiciliaries (e.g. Illinois, New York, Maryland, North Carolina). These so-called "long arm statutes" have produced a variety and contrariety of interpretations and their precise constitutional limits have never been delineated by this Court (*Nelson* v. *Miller*, 11 Ill. 2d 378). This is, therefore, the first case presenting the issues squarely to this Court.

The decision of the Court of Appeals of the State of New York offends against the constitutional guaranty of due process of law since it subjects the petitioner, a non-domiciliary, to jurisdiction in New York State in an action alleging a tort which occurred in Connecticut, notwithstanding that petitioner's only connection with New York State was the existence of its product on the shelf of the independent distributor, Walker, who had purchased it by mailing an order to the petitioner in Illinois where it was

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cases the new long arm statute (Section 302 CPLR) did not change the former law, and that before a non-domiciliary could be subject to New York jurisdiction there must be a prior showing that the non-domiciliary was "doing business" in New York rather than "transacting business".

Commenting upon its prior decision, (in *Simonson* v. *International Bank*, 14 N. Y. 2d 281, 290), it observed (p. 627):

> "Our Court in Simonson, after discussing the grant by Federal decisions of increased powers to States to subject foreign corporations to the personal jurisdiction of their courts, stated *in effect that as to tortious acts committed outside the State of New York the rule has not been changed and that the requirement of 'doing business' persists*" (italics ours).

processed and shipped f.o.b. Illinois. These facts, alone, demonstrate that the basic constitutional standards enunciated by this Court have not been satisfied and the decision by the New York Court of Appeals is plainly in conflict with the decisions of this Court in *McGee* v. *International Life Insurance Company*, 355 U. S. 220 (1957); *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945) and *Hanson* v. *Denckla*, 357 U. S. 235 (1958).

The New York Court of Appeals extended the "minimal contact" theory beyond the limits contemplated by the Constitution of the United States and the Fourteenth Amendment thereto.

The New York Court of Appeals violated petitioner's constitutional right in sustaining *in personam* jurisdiction in that at the time of the sale of its product, petitioner was not subject to jurisdiction in New York. Here, too, it is palpable that since the decision of the New York Court of Appeals accords retroactive effect to the new statute it offends against settled decisional precedents of the federal Courts. *Guerra De Chapa* v. *Allen*, 119 F. Supp. 129 (S.D. Texas 1954); *Jennings* v. *McCall Corporation*, 320 F. 2d 64 (8th Cir. 1963).

The "Minimal Contact" Standards Were Not Fulfilled

In *Hanson* v. *Denckla, supra,* the court made clear that a state's right to assert *in personam* jurisdiction over a non-domiciliary is not unrestricted nor unlimited. There must be "minimal contact" between a non-domiciliary and the forum and such "minimal contact" cannot be equated with the fortuitous presence of products on the shelves of distributors in the state where jurisdiction is sought. It is fundamental that the theory of "minimal contact" must be applied so as to avoid conflict with the standards of justice and fair play.

The flow of products from one state into another state does not, in and of itself, establish the requisite "minimal contact" [*Pendzimas* v. *Eastern Metal Products Corp.*, 218 F. Supp. 524 (D. Minn. 1961); *Erlanger Mills* v. *Cohoes Fiber Mills*, 239 F. 2d 502 (4th Cir. 1956)] nor does the mere solicitation of business in this State satisfy the constitutional criterion. *Long* v. *Victor Products Corp.* 297 F. 2nd 577 (8th Cir. 1961).

The term "transacts any business" is limited to acts done by the defendant within the state where jurisdiction is sought and this does not include shipping products into the state from outside the state. *Insull* v. *New York World Telegram Corp.*, 172 Fed. Supp. 615 (N. D. Ill., 1959).

The systematic and continuous marketing of products in the forum where jurisdiction is sought does not confer "*in personam*" jurisdiction in the absence of an act in the forum state giving rise to the action. *Kaye-Martin* v. *Brooks*, 267 F. 2d 394 (7th Cir., 1959), cert. den. 361 U. S. 832.

The *quantum* of business done in the forum where jurisdiction is sought is not controlling where the shipment is made from outside the forum. *Groback* v. *Addo. Machine Corp.*, 16 Ill. 2d 426. (The amount of petitioner's business in New York State shipped from Illinois was less than 1% of its total business, as found by Mr. Justice Nathan (RA29).)

Indeed, in the case at bar, the petitioner did no more than ship the product at issue here, F.O.B. Illinois to the independent distributor Walker in New York. This transaction cannot and does not meet the "minimal contact" requirement defined by *Hanson* v. *Denckla* (*supra*).

The reliance by the Court of Appeals of this State on *International Shoe Co. v. Washington* (*supra*), and *McGee* v. *International Life Insurance Co.* (*supra*), is misplaced. In *International Shoe* (*supra*), the salesmen employees of the non-domiciliary resided in the State of Washington. In addition, the petitioner in that case maintained and rented sample rooms in Washington displaying its wares. In the *McGee* (*supra*), the contract was an insurance contract. This was a special situation charged with a public interest. None of these facts are present in the case at bar.

To sustain jurisdiction here would be a serious threat and deterrent to the free flow of commerce between the states. *Erlanger Mills* v. *Cohoes Fibre,* (*supra*).

In that case Mr. Justice Sobeloff stated (p. 507):

> "Furthermore to sustain jurisdiction here would not only be offensive to the due process clause, but it would involve grave burdens and impediments to interstate commerce if the door should be opened to similar legislation by other states. Davis v. Farmers Cooperative Equity Co. 262 U. S. 312, 43 S. Ct. 556, 67 L. Ed. 996; Atchison T. & S. F. R. R. Co. v. Wels 265 U. S. 101, 44 St. Ct. 469, 68 L. Ed. 928; cf. Denver v. Rio Grande Western Railroad Co. v. Terte 284 U. S. 284, 52 S. Ct. 152, 76 L. Ed. 295, and International Milling Co. v. Columbus Transportation Co. 292 U. S. 511, 54 S. Ct. 797, 78 L. Ed. 1396. To illustrate the logical and not too improbable explanation of the problem let us consider the hesitancy of a California dealer to sell a set of tires to a tourist with Pennsylvania License plates, knowing that he may be required to defend in the courts of Pennsylvania a suit for refund of

the purchase price or for heavy damages in case of an accident attributed to a defect in the tires. As in the hypothetical case, the sale in the principal case was with the reasonable expectation that these goods are to be used or consumed in the (vendee's domicile) and are so used and consumed. It is difficult to conceive a more serious threat and deterrent to the free flow of commerce between the States."

Section 302 CPLR Should Not Be Applied Retroactively

The final issue here is whether the retroactive application of Section 302 CPLR deprived the petitioner of property without due process of law.

The petitioner contends that Section 302 CPLR is both a procedural and a remedial statute, that it created a right of action where one was not available at the time of the sale of the hammer or at the time of the injury.

The holding of the Court of Appeals conflicts with the decisions of the Federal Courts. *Guerra de Chapa* v. *Allen, (supra)*; *Jennings* v. *McCall Corporation, (supra)*; *Hasse* v. *American Photograph Corp.*, 299 F. 2d 666 (10th Cir. 1962).

In *Guerra de Chapa* v. *Allen, supra,* the Court stated (pp. 132-133):

> "While the constitutional inhibition against retroactive laws does not apply to statutes pertaining to remedies or procedure unless they destroy or impair vested rights, I think it is clear that substituted service statutes, subjecting citizens of other states to jurisdiction, are substantive as well as procedural. True, such statutes provide procedure; but first they confer jurisdiction over a person not

before subject to that jurisdiction. In the words of the Ohio Court of Appeals, they are 'highly jurisdictional'."

To compel a non-domiciliary to defend in a forum where it has not consented to be sued; where it does not reside and where it does not conduct any business, creates an unreasonable burden on trade and an impediment to the free flow of goods across state lines. The issue here is similar in all respects to the non-resident motorist statutes which have been held invalid when applied retroactively. *Guerra De Chapa* v. *Allen* (*supra*).

The novel questions presented by this petition should be resolved by this Court. The decision here will be of great benefit to the business community and will define the rights and obligations of businessmen who ship their products in Interstate Commerce.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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ABRAHAM BURSTEIN,
NATHAN E. ZELBY,
Of Counsel.

APPENDIX

Order and Opinion of Supreme Court of the State of New York, County of New York

SUPREME COURT

STATE OF NEW YORK,

SPECIAL TERM, PART I, NEW YORK COUNTY.

Index Number 15655 Year 1963

Present: HON. JACOB MARKOWITZ, Justice.

[SAME TITLE]

The following papers numbered 1 to 11 read on this motion, submitted by Court, on October 25, 1963.

Calendar No. 121.

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Replying Affidavits	9
Exhibits (Summons & Complaint)	10
Minutes	11

Upon the foregoing papers Motion to vacate service herein is granted. It has previously been determined that the defendant was not doing business in this jurisdiction, and nothing has been presented herein to show that the situation has changed. Since the tortious act complained of did not take place in this state, or arise directly out of any transaction of business by defendant in this state, the new procedure incorporated in section 302 of the CPLR is inapplicable.

Dated: November 21, 1963.

J. M.
J. C.

Briefs: Plaintiff's .... Defendant's .... Relator's ....
Respondent's .... Petitioner's ....

Order of Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 26th day of May, 1964.

7147

Present—Hon. BERNARD BOTEIN,
" CHARLES D. BREITEL,
Presiding Justice
" FRANCES L. VALENTE,
" SAMUEL W. EAGER,
" G. ROBERT WITMER,
Justices

FREDERICK F. SINGER, individually and as guardian and parent of MICHAEL SINGER, an infant,
Plaintiffs-Appellants,

vs.

ALAN WALKER, doing business under the firm name and style of WALKER'S MINERALS at 799 Lexington Avenue, New York City,
Defendant,

AND

ESTWING MANUFACTURING CO., INC., also known as ESTWING MANUFACTURING COMPANY,
Defendant-Respondent.

An appeal having been taken to this Court by the plaintiffs-appellants from an order of the Supreme Court, New York County, entered on the 21st day of November, 1963, granting defendant-respondent's motion to vacate service of the summons and complaint, and said appeal having been argued by Mr. Harry L. Koenig of counsel for the appellants, and by Mr. Abraham Burstein of counsel for the respondent; and due deliberation having been had thereon, and upon the opinion of this Court filed herein,

It is unanimously ordered that the order so appealed from be and the same is hereby reversed, on the law, without costs, and the motion to vacate service of the summons and complaint denied.

Enter:

VINCENT A. MASSI,
Clerk

Opinion of Supreme Court, Appellate Division, First Department, March 1964

BREITEL, J.:

The issue in this personal injury action is whether the courts of this State may exercise personal jurisdiction over defendant foreign corporation under CPLR, section 302, and subject to the applicable constitutional limitations. Special Term held there was no such jurisdiction and plaintiffs appeal.

At Special Term, it was held that, because defendant corporation was not doing business in this State and the cause of action did not arise from any tortious act or from transaction of business in this State by defendant, the new statute (section 302) did not confer jurisdiction. While it is true that defendant does not do business in the State, and this has been judicially determined in a prior action brought by plaintiffs, the new statute authorizes jurisdiction over a non-domiciliary where a cause of action against him arises from the commission of a tortious act within the State. Because, under the complaint, defendant was responsible for a continuous tortious act, namely, the circulation in New York of a defective hammer, always bearing its mislabeling, a tortious act occurred in this State from which the cause of action arose; for the hammer would not have been acquired in New York except for the undisclosed defect and the mislabelling, and the occurrence of the harm in Connecticut was incidental for jurisdictional purposes. Notably, the statute is not defined in terms of requiring that the cause of action arise in the State, but only that it arise from the commission of a tortious act in the State. This is within constitutional limits, and, therefore, there is per-

sonal jurisdiction over defendant, and the order setting aside service of the summons and complaint should be reversed and defendant's motion denied.

The complaint contains two causes of action, one in breach of warranty and the other in negligence. It alleges that a geologist's hammer, marked as unbreakable, broke while being wielded in rock-breaking by infant plaintiff, then 10 years old, resulting eventually in the loss of his eye. The hammer had been manufactured in Illinois by defendant corporation, and shipped, f.o.b. Rockford, Illinois, to a New York dealer. He had purchased it by a direct mail order, using a catalogue which had been mailed to him by defendant. The boy's aunt purchased the hammer from the New York dealer in February, 1960 and presented it to the boy. Plaintiffs, father and son, are residents of New York, but in April, 1960 they were in Connecticut on a field trip when the hammer broke and the son's injury sustained. The complaint also alleges that the hammer, if defective, had dangerous propensities and was an imminently as well as an inherently dangerous instrument.

Plaintiffs brought a prior action, but the service of process was set aside twice: first, on the ground that the service was not made on a proper person, and second, on the ground that defendant was not doing business in the State. The determinations were made under the old statute and before the jurisdiction over non-domicilaries was enlarged by section 302. Insofar as it was determined, however, that defendant did not do business within the State under the more traditional rules of jurisdiction to which CPLR §301 makes reference, it is *res judicata*, and plaintiffs may no longer rely on that basis for attempting service of process. (Restatement, Judgments,

§49 incl. Comment b.) The traditional rules, of course, are to be distinguished from the expanded jurisdiction now provided under CPLR §302, including the transacting of any business and the committing of any tortious act within the State. To the extent that the statute of limitations is not a bar because of infancy, a new action may be pursued under the procedural remedy provided by section 302 (CPLR §10003; *Muraco* v. *Ferentino*, 42 Misc. 2d 104, 105-106; 1 Weinstein, K. & M., New York Civil Practice, Par. 302.04).

The new statute, effective September 1, 1963, provides in relevant part:

> "§302. Personal jurisdiction by acts of non-domiciliaries.
>
> (a) Acts which are the basis of jurisdiction.
>
> A court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he:
>
> 1. transacts any business within the state; or
>
> 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
>
> 3. Owns, uses or possesses any real property situated within the state."

The tort cause of action arose in Connecticut, under traditional analysis; but as already stated the statute is

not case in terms of where the cause of action arose. The modern trend is to reject the old cause of action test, both as a matter of fairness and because of the definitional problems which follow in the wake of that test (cf. Uniform Interstate and International Procedure Act, §1.03 incl. Commr's Notes, 9 B Uniform Laws Ann. 1963 Suppl., pp. 75-78). It suffices that a tortious act is committed within this State, albeit the harm, and, therefore, the cause of action, arose in Connecticut.*

A breach of warranty resulting in harm is now characterized as also a tortious wrong (*Goldberg* v. *Kollsman Instrument Corp.*, 12 N. Y. 2d 432, 436; *Randy Knitwear* v. *American Cyanamid Co.*, 11 N. Y. 2d 5, 10-11; Prosser on Torts [2nd ed.] pp. 493-496). Hence, both causes of action are in tort. That a tortious act was committed by defendant corporation in New York would appear from the physical delivery and circulation in the New York market of the defective hammer, a particularly dangerous instrument because of its function and the false labelling which it bore with respect to its unbreakability (Restatement, Torts, Second [Tent. Draft #10, April 20, 1964] §402A).** The fact that the hammer was shipped by the

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* The Advisory Committee on Practice and Procedure stated the CPLR section "is designed to take advantage of the constitutional power of the State of New York to subject non-residents to personal jurisdiction when they commit acts within the state" (2nd Prel. Report of Advisory Comm. on Prac. and Proc. [1958 Report, Temp. Comm. on Courts] Leg. Doc. 1958, No. 13, p. 39).

** "§402A. *Special Liability of Seller of Product to User or Consumer.*

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property, is subject

seller, f.o.b. Rockford, Illinois, is significant in sales law for determining the risk of loss in transit and the like. Nonetheless, it is still the seller, defendant corporation, which sent the mislabelled defective hammer into the New York market knowing that it would be circulated there for sale.

To be sure, cases analyzing in traditional fashion the tortious act as compared with the complete tort hold generally that the duty of proper manufacture was breached in the manufacture or production of a defective product and, therefore, occurs only at the place of manufacture (see, *e.g.*, *Trippe Manufacturing Co.* v. *Spencer Gifts, Inc.*, 270 F. 2d 821, 823 [7th Cir.]; *Putnam* v. *Triangle Publications, Inc.*, 245 N. C. 432, 96 S. E. 2d 445, 454; *Insull* v. *New York World-Telegram Corp.*, 172 F. Supp. 615, 631 [E. D. Ill.], aff'd 273 F. 2d 166 [7th Cir.], cert. denied 362 U. S. 942; 2 Frumer and Friedman, Products Liability, §45.02 and cases cited; cf. *Atkins* v. *Jones & Laughlin Steel Corp.*, 258 Minn. 571, 104 N. W. 2d 888, 892-893; see, also, Uniform Interstate and International Procedure act,

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to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) The seller is engaged in the business of selling such a product, and

(b) It is expected to reach the user or consumer in the condition in which it is sold.

(2) The rule stated in subsection (1) applies although

(a) The seller has exercised all possible care in the preparation and sale of his product, and

(b) The user or consumer has not bought the product from or entered into any contractual relation with the seller."

(See, also, the reporter's notes, including his classification, under the cases, of dangerous products.)

§103 incl. Commr's Notes, 9 B Uniform Laws Ann. 1963 Suppl., pp. 75-78, *supra*). The analysis is then carried further to allow of jurisdiction *in personam* where the harm occurred, because the cause of action arose there, even if not at the place of manufacture or production). But there are some breaches of duty which create a continuing condition of hazard to users, very much like an enjoinable nuisance which may ground a cause of action short of the harm having yet occurred (66 C. J. S., Nuisances, §110; Anno. Injunction—Threatened Nuisance, 26 ALR 937; 55 ALR 880). In the case of an instrument defective in construction or dangerous because mislabelled the hazards persists wherever and so long as the product circulates. To be sure, if there had not been any contract with the user in a place where the product has circulated (in this case, New York) but only in the place where the harm occurred (in this case, Connecticut), it could not be said that the cause of action arising from the harm had any practical relation to the events in the place where the product had merely circulated (New York). Hence, in that instance, it could not be said that the cause of action arose from any act in the place of circulation (New York). That, however, is not this case.

In this case the acquisition by the infant plaintiff of the defective hammer occurred in New York and occurred in New York only because the defendant was responsible for the circulation in New York of the defective hammer which, being mislabelled, increased the hazard. It is alleged that there was reliance by the aunt and plaintiffs on the representations. The fact that the infant plaintiff obtained possession of the hammer in New York is an essential nexus to sustain jurisdiction. By the same token, the place or places to which the infant plaintiff took the hammer in his use of it is of less relevance. Thus, it happened that it was in Connecticut that the

defective hammer broke under the strain to which it was subjected and caused the arm. It could just as well have been in New York or in any other place that this would have happened.

On this view, the tortious act, namely, the circulation in New York of the dangerous instrument mislabelled, was proximately connected with the acquisition and continued possession by the infant plaintiff and his resulting injury. This should suffice, therefore, to satisfy the requirements of subdivision 2 of section 302 and also to satisfy the constitutional limitations which require some contacts within the state in which the action is brought in order to sustain personal jurisdiction.

Until recently, products liability cases had been restrictively affected by the "doing business" or "presence" doctrine of jurisdiction in the selection of forums in which the foreign manufacturers might be sued. Under the impact of the newer jurisdiction-expanding cases in the Supreme Court, the restrictions have been substantially removed (*International Shoe Co.* v. *Washington,* 326 U. S. 310; *McGee* v. *International Life Ins. Co.,* 355 U. S. 220; 2 Frumer and Friedman, Products Liability, §45.01, *supra*).

It has been recognized that, assuming some causal nexus, jurisdiction, as distinguished from the application of the appropriate law, may rest upon events (contacts) in between the manufacture of a harmful product and the occasion of harm. Whatever other reasons exist for the rarity of cases involving this intermediate situation, a principal cause would be that there was no opportunity to entertain such cases so long as the old "doing business" or "presence" doctrine prevailed. (For a subtle and considered discussion of the problem see Ehrenzweig on Conflict of Laws, 114-118, 587-592.) Restatement, Con-

flicts, Second, in stating the rules to cover the enlarged judicial jurisdiction over non-domiciliaries says of a foreign corporation in part:

> "A state has judicial jurisdiction over a foreign corporation as to causes of action arising out of (1) an act done, or caused to be done, by the corporation in the state or resulting in consequences there . . ." (Tent. Dr. #3 [1956] §91a; cf. *id.* §84 incl. Comments).

While the Restatement does not go as far in its Comments as does Ehrenzweig in his analysis, its language, it would seem, is sufficiently broad to embrace the same concepts.

A recent and influential case, albeit distinguishable, in the field of jurisdiction is *Erlanger* v. *Cohoes Fibre Mills* (239 F. 2d 502 [4th Cir. 1956]). There the court struck down as unconstitutional the application of a very broad North Carolina jurisdiction statute.* Plaintiff sued in federal court in North Carolina against a New York cor-

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* The pertinent part of the statute reads:

> *"Jurisdiction over foreign corporations not transacting business in this State*—(a) Every foreign corporation shall be subject to suit in this State by a resident of this State or by a person having a usual place of business in his State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:
>
> * * * * *
>
> "(3) Out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used and consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers." (G. S. §55-38.1)

poration for the sale to it of inferior goods. The order for the goods had been placed in New York by plaintiff and accepted in New York, and the goods were then shipped f.o.b. New York. That case, of course, did not involve the present situation. In this case the goods were ordered from New York by a New York dealer from defendant's catalogue which had been sent into New York by defendant, and the goods were then shipped into New York. Moreover, unlike the *Erlanger* case, defendant corporation, although short of being present in the jurisdictional sense, does a great deal of business directly in the New York area, sending its salesmen and its catalogues into the city. In the *Erlanger* case it was a first transaction for the defendant with the North Carolina firm, and all arrangements for the purchase had been made in New York by plaintiff. Withal, the *Erlanger* decision has not been without its adverse critics (see 1 Weinstein, K & M., *op. cit. supra,* ¶302.03 at pp. 3-33 to 3-34). But there is a further distinction to be made between the *Erlanger* case and this one. The *Erlanger* case involved but an ordinary breach of warranty in contract resulting in a claim of lesser value. This case is in tort and involves an instrument dangerous to human beings if defective. (Restatement, Conflicts, Second [Tent. Dr. #3 1957] §84, Comment c.)

Supportive of the analysis here, and in its facts going well beyond the necesities of this case, is *Gray* v. *American Radiator & Sanitary Corp.* (22 Ill. 2d 432). That case involved a statute very similar to section 302. Under it the court sustained jurisdiction over a defendant manufacturer located in Ohio which had sold its product to a manufacturer in Pennsylvania, who assembled it into a water heater. The heater was sold in Illinois and exploded there injuring plaintiff Gray. The case, of course,

presents difficult problems since the manufacturer's contact with the State of Illinois was slender, indeed, it having done little in Illinois except to be responsible for its defective part having been incorporated into an assembly which, in turn, was sent and delivered into Illinois by another. (For an analysis of the *Gray* case, see Weinstein, K. & M., *op. cit. supra,* ¶302.10.)

It would seem, therefore, that the New York statute comes well within the constitutional limitations. It is not necessary to determine in this case whether the New York statute exhausts the possibilities within the constitutional limitations. Of paramount importance, no doubt is the fact that an instrument dangerous to human life and health, if defective, is involved. Due process considerations would undoubtedly be more restrictive if there were involved simply a dispute of commercial dimensions between parties to a commercial contract. Where one introduces into a state a dangerous instrument the expectation of responsibilities should be greater. Of little consequence except, perhaps, for purposes of determining the applicable conflict of law rules, is the fact that a cause of action in the traditional sense arose in Connecticut. Whatever it was the defendant corporation did, it did not only in the State of Connecticut, but it did the same in the State of New York. Once it is found that a tortious act occurred in this State it is only reasonable that the actor should be responsible in New York to its residents with respect to any cause of action arising from such activity.

Accordingly, the order granting defendant corporation's motion to set aside the service of the summons and complaint should be reversed on the law, without costs.

All Concur.

Opinion of Court of Appeals

FULD, J. In the three cases under review—one sounding in contract and two in tort—we are called upon to decide whether the courts of this State acquired personal jurisdiction, under our "long-arm" statute (CPLR 302), over foreign corporations not "doing business" here in the traditional sense. Since there are several questions of law common to all three cases, we discuss such questions generally, at the outset, before undertaking a more particularized consideration of the cases themselves.

It is exceedingly clear that common-law principles of jurisdiction were early imported into the jurisprudence of the several states and have since taken on constitutional character by virtue of Supreme Court rulings that the improper exercise of jurisdiction by state courts infringes due process guarantees. (See, e.g., *Pennoyer* v. *Neff*, 95 U. S. 714; *Riverside Mills* v. *Menefee*, 237 U. S. 189.) The traditional foundation of judicial jurisdiction is physical power (see *McDonald* v. *Mabee*, 243 U. S. 90, 91), and in the case of foreign corporations, with which we are here mainly concerned, unless they have voluntarily submitted to jurisdiction, such power is assertable solely on the basis of the activities of the corporations within the forum state.

The standard for assessing the irreducible minimum forum activities constitutionally requisite to subject foreign corporations and nonresident individuals to personal jurisdiction was reformulated in the cases of *International Shoe Co.* v. *Washington* (326 U. S. 310) and *McGee* v. *International Life Ins. Co.* (355 U. S. 220). By those decisions, the Supreme Court opened a broad and previously unavailable—although still largely undefined—area for state exercise of jurisdiction over such parties.

In place of the former rigid tests of "residence" and "doing business", the Supreme Court, in *International Shoe*, substituted the flexible requirement that a nonresident defendant, against whom a judgment in personam is sought in the forum state, be shown merely to "have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' " (326 U. S., at p. 316). And, in *McGee*, the court upheld the power of a state to subject a foreign corporation to suit in its courts on the basis simply of an isolated insurance contract "which had substantial connection with that State" (355 U. S., at p. 223).[1]

But this does not mean, the Supreme Court made clear in the later case of *Hanson* v. *Denckla* (357 U. S. 235), that all restrictions on a state court's exercise of personal jurisdiction over foreign corporations have come to an end. Restating its view that "progress in communications and transportation" has occasioned a relaxation of "the rigid rule in *Pennoyer* v. *Neff*" and an evolution to "the flexible standard of *International Shoe*", the court went on to caution that "it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts" (357 U. S., at p. 251). "The unilateral activity of those who claim some relationship with a nonresident defendant", the court concluded, "cannot satisfy the requirement of contact with the forum State. * * * [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (357 U. S., at p. 253).

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[1] The foreign corporation in *McGee* maintained no office or agent in the forum state and had apparently never solicited or done any business there apart from writing the policy in question (355 U. S., at p. 222).

Taking advantage of the Supreme Court's broadening of the bases for the exercise of personal jurisdiction over nondomiciliaries, the Legislature of this State, in 1962, following a study and a recommendation by the New York Advisory Committee on Practice and Procedure,[2] enacted CPLR 302. Modeled upon a provision of the Illinois Civil Practice Act (Ill. Stat. Ann., ch. 110, §17 [Smith-Hurd, 1956], section 302 discarded the concept of "doing business" as the exclusive test of jurisdiction and provided, instead, insofar as here pertinent, that personal jurisdiction may be asserted over any nondomiciliary if "in person or through an agent", he "transacts any business within the state" or "commits a tortious act within the state," as long as the particular cause of action asserted is one "arising from" any of such acts.[3]

The appellants in all three cases before us, noting that the acts on which the causes of action asserted against them are grounded occurred prior to the effective date

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[2] See N. Y. Advisory Comm. Rep. (N. Y. Legis. Doc., 1958, No. 13), pp. 37-41; see, also, Senate Finance Comm. Rep. (N. Y. Legis. Doc., 1961, No. 15), pp. 7-10, 66-67.

[3] The entire text of subdivision (a), the portion of the statute with which we are concerned, reads as follows:

"(a) Acts which are the basis of jurisdiction. A court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he:

"1. transacts any business within the state; or

"2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

"3. owns, uses or possesses any real property situated within the state."

of the statute, September 1, 1963, advance the threshold contention that section 302 may not be applied retroactively to subject them to the personal jurisdiction of the New York courts. We have already expressed a contrary view. In *Simonson* v. *International Bank* (14 N Y 2d 281, 290), we declared that "CPLR 302 has retroactive effect to the extent of embracing suits instituted after its effective date but based on previously accrued causes of action", and no reason has been shown to cause us to alter our opinion.

Whether, and to what extent, a statute is to be accorded restroactive application is normally a matter of ascertaining the legislative intent, subject to applicable constitutional limitations, and our decisions provide certain basic guidelines to that end. It is thus presumed, absent any contrary indication, that the Legislature intended "[c]hanges in the form of remedies" to be "applicable to proceedings thereafter instituted for the redress of wrongs already done." (*Matter of Berkovitz* v. *Arbib & Houlberg*, 230 N. Y. 261, 270; see, also, *Simonson* v. *International Bank*, 14 N Y 2d 281, 289, *supra*; *Coane* v. *American Distilling Co.*, 298 N. Y. 197, 204; *Preston Co.* v. *Funkhouser*, 261 N. Y. 140, 145.) On the other hand, where the effect of the statute "is to create a right of action" which did not previously exist, it is presumed that the statute was intended to have only prospective application. (See *Jacobus* v. *Colgate*, 217 N. Y. 235, 240-242.)

Section 302 is clearly of a procedural and remedial nature, and that, indeed, was the characterization applied by the Supreme Court to the somewhat similar provisions of the California statute before it in the *McGee* case (355 U. S. 220, *supra*). In upholding the retroactive application of that statute, the Supreme Court

observed that such legislation is "remedial, in the purest sense of that term, and neither enlarge[s] nor impair[s] * * * substantive rights or obligations", its effect being merely to provide the plaintiff with a new "forum to enforce whatever substantive rights" he might have against the defendant (355 U. S., at p. 224). And the Illinois Supreme Court reached a like conclusion with respect to the statute from which section 302 was derived, also sustaining its retroactive application to a suit instituted subsequent to its enactment but based on a cause of action which had previously accrued. (See *Nelson* v. *Miller,* 11 Ill. 2d 378, 382-383.)

The statute involved in *Jacobus* v. *Colgate* (217 N. Y. 235, *supra*), upon which the appellants before us rely, was of a materially different character. That statute was held, in effect, to have created a new right of action—to have supplied "a remedy by which a right for the first time [became] enforceable" (217 N. Y., at p. 242)—by converting what was previously an exclusively "local" cause of action (for injuries to real property lying without the state) into one which was "transitory" (p. 241). As already noted, section 302, far from creating new rights, merely facilitates the enforcement locally of pre-existing rights.[4] Moreover, the Legislature expressly declared that the CPLR "shall apply to *all* actions here-

[4] Since section 302 rests not on any theory of implied consent on the part of the defendant to submit to this State's jurisdiction if he commits acts herein but, rather, on New York's inherent power to exercise jurisdiction over a nonresident defendant who has the requisite minimal contacts with it (see N. Y. Advisory Comm. Rep. [N. Y. Legis. Doc., 1958, No. 13], pp. 39-41; see, also, 1 Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 302.04), the decisions—to which the appellants point—denying retroactive effect to statutes predicated on a theory of implied consent, such as the original nonresident motorist statutes (see, e.g., *Kurland* v. *Chernobil,* 260 N. Y. 254, 257; *Gruber* v. *Wilson,* 276 N. Y. 135, 140), are not here in point.

after commenced" (CPLR 10003; emphasis supplied), thereby giving affirmative indication of its design to apply the statute to *all* suits instituted after its effective date, whether based on previously or subsequently accrued causes of action. (See 1 Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 302.04, at pp. 3-35.)

The retroactive application of provisions resembling section 302 has, as noted, been upheld as constitutionally valid (see, e.g., *McGee* v. *International Life Ins. Co.*, 355 U. S. 220, 224, *supra; Nelson* v. *Miller*, 11 Ill. 2d 378, 382-383, *supra; Bluff Cr. Oil Co.* v. *Green*, 257 F. 2d 83, 85-86), and it is of significance that the Supreme Court, in a very recent decision (*United States* v. *First Nat. City Bank*, 379 U. S. 378), apparently perceived no constitutional impediment to our construction giving retroactive effect to section 302, as indicated in *Simonson*, to the extent of applying it to a "suit * * * instituted *after* the effective date of the statute" upon the basis of "transactions occurring *before* the effective date" (379 U. S., at p. 382; italics in original). While we left open in *Simonson* the possibility that retroactive application of the statute "in particular situations" might give rise to constitutional questions (14 N Y 2d, at p. 288), no such exceptional situation is presented in any of the cases before us.

We turn, then, to those specific cases. It is the position of each of the appellants that section 302 may not be interpreted to apply to the particular facts involved and that, if it were to be so construed, the statute would violate due process limitations. One of the cases, *Longines-Wittnauer Watch Co.* v. *Barnes & Reinecke*, is a suit for breach of contract and turns on paragraph 1 of subdivision (a) of section 302—relating to a defendant's "transact[ion of] any business within the state". The

other two—*Feathers* v. *McLucas* and *Singer* v. *Walker*—are founded on claims of negligence, as well as of breach of warranty, and were decided below on the basis of paragraph 2 of subdivision (a) of section 302—involving a defendant's commission of "a tortious act within the state".

Longines-Wittnauer v. *Barnes & Reinecke*

The plaintiff Longines-Wittnauer, a New York corporation, seeks damages of some $476,000 for breach of warranty in the manufacture and sale of machines specially designed for it by the appellant Barnes & Reinecke, a Delaware corporation having its place of business in Chicago, Illinois. The parties had carried on negotiations in 1962, the appellant in April and May of that year mailing its contract proposals for the machines to the plaintiff in New York and shortly thereafter sending key officers to this State to discuss the terms of the agreement. After further meetings in Chicago, a written contract in the form of a printed purchase order was executed in June 1962 by the appellant in Chicago, the purchase order itself reciting, however, that it was "a contract made in the State of New York and governed by the laws thereof". Thereafter, officers and employees of the appellant, including its president, treasurer and engineers, twice came to the plaintiff's plant in Lynbrook on Long Island to discuss certain problems in connection with the performance of the contract. There were meetings in Chicago as well, and in March 1963 a supplemental agreement was executed by the plaintiff in New York after it had been signed by the appellant in Chicago. This agreement increased the price of the machines from $109,000 to $118,000 and provided, among other things, that their delivery did not constitute acceptance, it being specified that such acceptance would occur

only after the machines had met certain tests following installation in New York. In April 1963, a month after the supplemental agreement was executed, the appellant shipped the machines, f. o. b. Chicago, directed to the plaintiff's plant in Lynbrook and thereafter participated in the installation and testing of the machines; in fact, two of its engineers spent substantially all of their working days at the plaintiff's plant from April through June 1963 getting the machines ready for acceptance testing.

The plaintiff, following its acceptance of the machines, discovered certain alleged defects, on the strength of which this action was commenced in October 1963, pursuant to CPLR 302 and 313, by service of the summons and complaint on the appellant in Illinois. The latter challenged the court's jurisdiction over its person by a motion to dismiss the complaint (CPLR 3211, subd. [a], par. 8). The court at Special Term denied the motion, the Appellate Division, First Department, unanimously affirmed the resulting order and the appeal is before us by leave of the Appellate Division on a certified question.

The appellant does not dispute that a single transaction in New York, out of which the cause of action has arisen, may satisfy the requirement of the transaction of business provision (CPLR 302, subd. [a], par. 1). The nub of its argument seems to be that, if the contract was not actually made in New York, its activities in this State preliminary and subsequent to the execution of the contract cannot be regarded as amounting to the transaction of "business" under the statute. We find no merit in this contention.

In enacting section 302, the Legislature chose not to fix precise guidelines, as other states have done, so as to draw within the jurisdictional reach of the New York

courts *only* contracts "made within this State" (Md. Ann. Code, rt. 23, §92, subd. [d]) or contracts "made in this State or to be performed in this State" (N. C. Gen. Stat., §55-145, subd. [a], par. [1]) or contracts "to be performed in whole or in part by either party in [this State]" (Minn. Stat. Ann., §303.13, subd. 1, par. [3]; Tex. Rev. Civ. Stat. Ann. [Vernon], art. 2031b, §4; Vt. Stat. Ann., tit. 12, §855). The Advisory Committee which drafted the section took cognizance of such statutes in its report (N. Y. Advisory Comm. Rep. [N. Y. Legis. Doc., 1958, No. 13], pp. 39-40) and decided, instead, to follow the broad, inclusive language of the Illinois provision, adopting as the criterion the "transact[ion of] *any* business within the state". The design of the legislation, as expressed by the committee, was to take advantage of the "new [jurisdictional] enclave" (*Bomze* v. *Nardis Sportswear*, 165 F. 2d 33, 36, per L. HAND, J.) opened up by *International Shoe* where the nonresident defendant has engaged in some purposeful activity in this State in connection with the matter in suit. (See N. Y. Advisory Comm. Rep. [N. Y. Legis. Doc., 1958, No. 13], pp. 39-40; see, also, 1 Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 302.06.) Therefore, even though the last act marking the formal execution of the contract may not have occurred within New York, the statutory test may be satisfied by a showing of other purposeful acts performed by the appellant in this State in relation to the contract, albeit preliminary or subsequent to its execution.[5]

The activities in which the appellant engaged in this State were assuredly adequate to meet the liberal statu-

[5] While by no means controlling, it is worthy of some note that the decisions interpreting the Illinois statute—on which, as we have noted, section 302 is modeled—have held that the place of contracting is not the exclusive criterion, and that the requisite transaction of business by the nonresident defendant within the forum may consist of such ac-

tory criterion. They comprised substantial preliminary negotiations through high-level personnel during a period of some two months; the actual execution of a supplementary contract; the shipment for use here, subject to acceptance following delivery, of two specially designed machines, priced at the not inconsiderable sum of $118,000; and the rendition of services over a period of some three months by two of the appellant's top engineers in supervising the installation and testing of the complex machines.[6]

We need not determine whether any one of the foregoing activities would, in and of itself, suffice to meet the statutory standard; in combination they more than meet that standard. And merely to list the activities in which the appellant engaged in this State answers any constitutional objection which might be raised against requiring the appellant to make its defense in our courts. Not only did the contract upon which the suit is based have "substantial connection" with New York (*McGee* v. *International Ins. Co.*, 355 U. S. 220, 223, *supra*) but the appellant's "contacts" with this State were such "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' ". (*International Shoe Co.* v. *Washington*, 326 U. S. 310, 316, *supra*.) Nor may it be

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tivity on his part as engaging in preliminary negotiations for the contract or in subsequent acts in furtherance thereof, the issue turning, in essence, on the totality of the defendant's activities within the forum. (See *Kropp Forge Co.* v. *Jawitz*, 37 Ill. App. 2d 475, 481; *Berlemann* v. *Superior Distr. Co.*, 17 Ill. App. 2d 522; *National Gas Appliance Corp.* v. *AB Electrolux*, 270 F. 2d 472, cert. den. 361 U. S. 959; *Magnaflux Corp.* v. *Foerster*, 223 F. Supp. 552; but cf. *Grobark* v. *Addo Mach. Co.*, 16 Ill. 2d 426; see, also, Currie, The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois, 1963 U. of Ill. L. Forum 533, 566-579).

[6] We do no more than note the added fact that the contract itself expressed the agreement of the parties that it was to be regarded as having been made in New York and as governed by New York law. (Cf. *National Rental* v. *Szukhent*, 375 U. S. 311, 315-316.

said that the limits indicated by *Hanson* v. *Denckla* (357 U. S. 235, *supra*) have been exceeded, for it is clear, to cull from the court's opinion in that case (p. 253), that the appellant "purposefully avail[ed] itself of the privilege of conducting activities within * * * [this] State" and thereby "invok[ed] the benefits and protections of its laws."

It follows that the courts below were fully justified in sustaining jurisdiction over the appellant Barnes & Reinecke.

Feathers v. *McLucas*

Mr. and Mrs. Feathers, the plaintiffs in this case, brought suit to recover for serious personal injuries and property damage sustained in July 1962 as a result of an explosion on a public highway near their home in Berlin, New York, of a tractor-drawn steel tank, en route from Pennsylvania to Vermont, which contained highly flammable liquified propane gas. The tank had been manufactured in Kansas in 1957 by the appellant, The Darby Products of Steel Plate Corporation (sued as The Darby Corporation), a Kansas company, under a contract with the Butler Manufacturing Co., a Missouri corporation, presumably with knowledge that the latter would mount the tank on a wheelbase and then sell it to E. Brooke Matlack, a Pennsylvania corporation, which operated as a licensed interstate carrier in Pennsylvania and several other states, including New York. All three companies were named among the defendants sued, the complaint charging Darby with negligence and breach of warranty in the manufacture of the tank.

Served with a summons and complaint in Kansas, pursuant to CPLR 302 and 313, the appelant moved to dismiss the complaint on the ground that the Court lacked jurisdiction of its person (CPLR 3211, subd. [a], par. 8), pointing

out that all its business was carried on from its plant and offices in Kansas City, Kansas, and that it never had any agents, representatives, offices or other facilities in this State and never transacted or solicited any business here. The motion was granted at Special Term but its order was reversed by the Appellate Division, Third Department, which granted leave to appeal to this Court on a certified question.

There being no showing—indeed, not even a claim—that the appellant transacted any business in this State, within the purview of paragraph 1 of subdivision (a) of CPLR 302, the case necessarily turns on the construction to be accorded paragraph 2. More particularly, we must ascertain whether the facts of the case satisfy the standard of paragraph 2 that the defendant be shown to have "commit[ted] a tortious act within the state".

The tortious act charged against the appellant—that it improperly designed and assembled the tank—indisputably occurred in the out-of-state manufacturing process in Kansas. Nevertheless, the Appellate Division sustained jurisdiction on the strength of the resulting injury in this State, theorizing that "the Legislature did not intend to separate foreign wrongful acts from resulting forum consequences", and it went on to say—directing its attention to the requirements of Federal due process—that section 302 "merely codified the minimum contacts test" laid down by the Supreme Court decisions.[7]

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[7] It was the Appellate Division's conclusion that the "minimum contacts" test was satisfied by the showing that the tank, with its load of flammable liquid, was "an instrumentality dangerous to life and property, if defectively constructed," and that the appellant had "knowledge" that the tank was designed for ultimate use by a Pennsylvania carrier in interstate commerce and "could be expected reasonably to foresee that its acts, if wrongful, might well have potential consequences in adjoining New York."

However, the question presented is not—as the Appellate Division intimated it was by its reference to "minimum contacts"—whether the Legislature *could* constitutionally have enacted legislation expanding the jurisdiction of our courts to the extent determined by the Appellate Division or whether, indeed, the Legislature *should* have done so in light of the pertinent policy considerations affecting the contending interests of local plaintiffs and foreign manufacturers but whether the Legislature *did*, in fact, do so. In short, in both this case and *Singer* v. *Walker* (*infra*, p. 464, *et seq.*), our task is simply to determine the import and scope of the jurisdictional provision which the Legislature actually enacted. As bearing on this, it cannot be made too clear that we are concerned solely with the problem of the court's jurisdiction over the person of a non-resident defendant and not with the question of his ultimate liability to a particular plaintiff; that issue is to be considered only after it is decided, on the basis of section 302, that the defendant is subject to the in personam jurisdiction of our courts.

The language of paragraph 2—conferring personal jurisdiction over a nondomiciliary "if, in person or through an agent, he * * * commits a tortious act *within* the state"—is too plain and precise to permit it to be read, as has the Appellate Division, as if it were synonymous with "commits a tortious act *without* the state which causes injury within the state." The mere occurrence of the injury in this State certainly cannot serve to transmute an out-of-state tortious act into one committed here within the sense of the statutory wording. (See *Aikins* v. *Jones & Laughlin Steel Corp.*, 258 Minn. 571, 579-580; *Rufo* v. *Bastian-Blessing Co.*, 405 Pa. 12, 20; *Hellriegel* v. *Sears Roebuck & Co.*, 157 F. Supp. 718, 720-721.) Any possible doubt on this score is dispelled by the fact that the draftsmen of section 302 pointedly an-

nounced that their purpose was to confer on the court "personal jurisdiction over a non-domiciliary *whose act in the state* gives rise to a cause of action" or, stated somewhat differently, "to subject non-residents to personal jurisdiction *when they commit acts within the state*". (See N. Y. Advisory Comm. Rep. [N. Y. Legis. Doc., 1958, No. 13], pp. 37, 39; emphasis supplied.) Having in mind the plain language of the statute and the expressed design of those who drafted it, we deem unreasonable the interpretation urged upon us by the plaintiffs.

It is not inappropriate to note that for some years prior to the enactment of CPLR 302 much attention had been given to the subject of state exercise of personal jurisdiction over a nonresident manufacturer charged with tortious activities in the manufacture of a product in another state which caused injury in the forum where the product was eventually marketed and sold [8] and that legislation expressly conferring jurisdiction on that basis had been enacted in a number of states.[9] If, in fact, the Legislature

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[8] See, e.g., N. Y. Law Rev. Comm. Study, Service of Process on Foreign Corporations (N. Y. Legis. Doc., 1959, No. 65[C]), p. 17 *et seq.*; Foster, Expanding Jurisdiction Over Nonresidents, Wis. Bar Bull. Supp., Oct. 1959, pp. 15-20; Reese, Judicial Jurisdiction Over Non-Residents, 13 Record of N. Y. C. Bar Assn., 139, 149-153; Reese & Galston, Doing An Act or Causing Consequences as Bases of Judicial Jurisdiction, 44 Iowa L. Rev. 249; see, also, 1 Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 302.10; Currie, The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois, 1963 U. of Ill. L. Forum 533, 544-560.

[9] See, e.g., Conn. Gen. Stat. Ann., §33-411, subd. (c), par. (3); Mont. Rules Civ. Pro., rule 4, subd. (B), par. (1), cl. (b); N. C. Gen. Stat., §55-145, subd. (a), par. (3); Wis. Stat. Ann., §262.05, subd. (4). The Connecticut statute, for instance, authorizes the exercise of jurisdiction over a foreign corporation, not otherwise transacting business in the forum, in any action arising out of the production, manufacture or distribution of goods in another state with the reasonable expectation of their being used or consumed in the forum state.

of this State had intended to confer jurisdiction on the strength of injurious forum consequences alone, without regard to the locus of the commission of the tortious act itself, it would presumably have used language appropriate to reflect such a design. Thus, it could have made explicit provision for such situations as some states have done,[10] or as proposed by the New York Law Revision Commission [11] or by the Commissioners on Uniform State Laws in their model act,[12] or it might have followed the lead of other states which require only that the "tort" be shown to have been committed within the state "in

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[10] See statutes cited, *supra*, n. 9.

[11] See N. Y. Law Rev. Comm. Rep. (N. Y. Legis. Doc., 1959, No. 65[C]), p. 3. The Law Revision Commission in 1959 proposed that section 229-a of the Civil Practice Act be amended to provide for jurisdiction over foreign corporations, not otherwise doing business here, where the action "arises out of * * * (c) Commission of any act resulting in this state * * * in injury to person or property, if the corporation * * * should reasonably have expected that the act would have consquences in this state; (d) Production [or] manufacture * * * of goods * * * where the goods * * * are used * * * or resold in this state * * * and the corporation * * * should reasonably have expected that they would be so used * * * [or] resold".

[12] See Uniform Interstate and International Procedure Act, §1.03, subd. (a), Uniform Laws Ann., vol. 9B (Supp. 1964). The model statute drafted by the Commissioners on Uniform State Laws significantly differentiates between a case in which the tortious injury was committed "by an act or omission in this state" and one where such injury was committed "by an act or omission outside this state"; in the latter situation, the statute requires, as an additional condition for the exercise of jurisdiction, that there be a showing that the nonresident defendant "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state." (Uniform Interstate and International Procedure Act, §1.03, subd. [a], pars. [3], [4]; see, also, Va. Code Ann., §8-81.2, subd. [a], pars. [3], [4].)

whole or in part".[13] In sharp contrast, the Legislature chose to adopt language which, in so many words, demands that the "tortious act" be one committed by the defendant, "in person or through an agent," *within* this State.

Our attention is directed to the broad niterpretation accorded in *Gray* v. *American Radiator & Sanitary Corp.* (22 Ill. 2d 432) to the similarly worded provision of the Illinois statute—relating to the commission of a tortious act within the state—on which paragraph 2 of subdivision (a) of section 302 was modeled. Although our analysis of New York's statute and its legislative history demonstrates that reliance on the *Gray* case is misplaced, we deem it desirable to examine its underlying rationale in view of the emphasis given the decision by the appellants in this case and in *Singer* v. *Walker* (*infra*, p. 464, *et seq.*). In *Gray*, an Illinois resident, injured in that state as a result of an explosion of a water heater which had, in the court's words, found its way into Illinois "in the course of commerce" (22 Ill. 2d, at p. 438), brought suit against an Ohio corporation which had (it was alleged) negligently manufactured in Ohio a safety valve later incorporated into the heater. The heater itself had been assembled in Pennsylvania by a Pennsylvania corporation which had purchased the valve from the Ohio manufacturer. In rejecting the defendant's contention that it had not committed "a tortious act" in Illinois, the court

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[13] See, e.g., Minn. Stat. Ann., §303.13, subd. 1, par. (3); Tex. Rev. Civ. Stat. Ann. (Vernon), art. 2031b, §4; Vt. Stat. Ann., tit. 12, §855. It has been held that such a statute—based on the commission within the state of the *"tort* in whole or in part"—is distinguishable from a statute, such as paragraph 2 of subdivision (a) of section 302, which requires the commission of the *"tortious act"* within the state, and, unlike the latter legislation, is sufficiently broad to confer jurisdiction in a case involving an out-of-state tortious act which results in injurious consequences within the forum state. (See, e.g., *Atkins* v. *Jones & Laughlin Steel Corp.*, 258 Minn. 571, 579-580, *supra.*)

invoked the traditional choice-of-law rule that "the place of a wrong is where the last event takes place which is necessary to render the actor liable" (p. 435) and concluded that, since the "last event", that is, the injury, had occurred in Illinois, "the tort was committed in Illinois" for purposes of the jurisdictional statute (p. 436).

We find this argument unconvincing.[14] It certainly does not follow that, if the "place of wrong" for purposes of conflict of laws is a particular state, the "place of the commission of a tortious act" is also that same state for purposes of interpreting a statute conferring jurisdiction, on that basis, over nonresidents. (See, e.g., *Hanson* v. *Denckla,* 357 U. S. 235, 253-254, *supra; O'Brien* v. *Comstock Foods,* 123 Vt. 461, 465.) Not only are these separate and distinct problems but the rules formulated to govern their resolution embody different concepts expressed in different language. Moreover, the place of the "tort" is not necessarily the same as the place of the defendant's commission of the "tortious act". In our view, then, the interpretation accorded the statute by the Illinois court disregards its plain language and exceeds the bounds of sound statutory construction. (See *McMahon* v. *Boeing Airplane Co.,* 199 F. Supp. 908, 909; *Atkins* v. *Jones & Laughlin Steel Corp.,* 258 Minn. 571, 579-580, *supra; Rufo* v. *Bastian-Blessing Co.,* 405 Pa. 12, 20, *supra;* see, also, Reese & Galston, Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction, 44 Iowa L. Rev. 249, 266-267; Stimson, Omnibus Statutes

[14] It is noteworthy that, prior to the decision in *Gray,* the Federal courts in Illinois had given a contrary interpretation to the statute, holding, in accordance with its plain language, that the provision was not meant to sanction jurisdiction over a nonresident manufacturer whose wrongful act outside the state caused an injury within the state. (See *Hellriegel* v. *Sears Roebuck & Co.,* 157 F. Supp. 718, 720-721, *supra; Trippe Mfg. Co.* v. *Spencer Gifts,* 270 F. 2d 821, 823; *Insull* v. *New York World-Tel. Corp.,* 273 F. 2d 166, 171.)

Designed to Secure Jurisdiction Over Out-of-State Defendants, 48 Amer. Bar Assn. J. 725, 727; Thornton, First Judicial Interpretations of the New York Single Act Statute, 30 Brooklyn L. Rev. 285, 291-292; Note, 50 Georgetown L. J. 310.)[15]

Reading the New York statute, as we do, to require a showing that the nondomiciliary committed a tortious act in this State, we need not pass upon the constitutional question raised by the appellant or consider whether the due process requirement of "minimum contacts" with the forum state would be satisfied by evidence that the injury occurred here and that the appellant presumably knew that its product (the tank) might ultimately reach New York in the course of its use by an interstate carrier or trucker. (See, e.g., *Hanson* v. *Denckla,* 357 U. S. 235, 253, *supra; Dooly* v. *Payne,* 326 F. 2d 941; *O'Brien* v. *Comstock Foods,* 123 Vt. 461, *supra.*)

In sum, then, it is our conclusion, based not only on the plain language of the statute but on its legislative history, that paragraph 2 of subdivision (a) of section 302 covers only a tortious act committed (by a nondomiciliary) in this State. Any plea for further expansion of its scope, however desirable such expansion may seem, is a matter for the Legislature rather than the courts. It follows, therefore, that, since the tortious act charged against the appellant Darby was committed, if at all, in Kansas and

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[15] The Illinois court, seeking to bolster its decision, further declared that "it [was] a reasonable inference that [the defendant's] commercial transactions * * * result[ed] in substantial use and consumption in this State" (22 Ill. 2d, at p. 442). If, as was thus assumed, there were substantial sales of the defendant's product within the State of Illinois, that factor might have served to support a finding that jurisdiction existed on the basis of the "transaciton of business" provision (*infra,* pp. 466-467) but it has no relevance on whether the defendant committed a tortious act within the state.

since, concededly, that company transacted no business whatsoever in New York, no basis exists in the present case for subjecting it to the jurisdiction of the courts of this State.

Singer v. *Walker*

The complaint alleges that in April of 1960 Michael Singer, then 10 years old and a resident of this State, was seriously injured when a geologist's hammer which he was using in Connecticut broke and a chip penetrated his right eye. The hammer, it is further recited, was manufactured by the appellant Estwing Manufacturing Co., an Illinois corporation not doing business in this State. Bearing a label, "UNBREAKABLE TOOLS ESTWING MFG. Co.", the hammer was shipped by the appellant, f. o. b. Illinois, to the defendant Walker, a dealer in geological supplies in New York City. Michael's aunt purchased the hammer from Walker and gave it to the child a month or two before the accident which, as stated, occurred in Connecticut when the hammer fragmented while the youngster, on a field trip with his father, was using it to break and split rock.

Service of process on the appellant in an action brought in this State prior to the enactment of section 302 was set aside on the ground that it was not "doing business" in New York under the jurisdictional standards then applied by our courts. (Cf. *Simonson* v. *International Bank,* 14 N. Y. 2d 281, *supra.*) The present action was brought, after the effective date of section 302, by service of the summons and complaint on Estwing in Illinois (CPLR 313). Its motion to dismiss the complaint on the ground that the court had not acquired personal jurisdiction (CPLR 3211, subd. [a], par. 8) was granted at Special Term "[s]ince the tortious act complained of did not

take place in this state or arise * * * [from] any transaction of business by defendant in this state". The Appellate Division, First Department, taking a different view, reversed "on the law" and denied the motion, holding that the cause of action was one arising from the commission of a tortious act in the State under paragraph 2 of subdivision (a) of section 302.

Our detailed analysis of that provision in *Feathers* v. *McLucas* (*supra*, pp. 458-464) and of paragraph 1 in *Longines-Wittnauer* v. *Barnes & Reinecke* (*supra*, pp. 455-458) permits us to be brief in treating this third case. And we note again that we deal with the case in the light of the statutory provision as it actually reads and not as it could, perhaps, have been written.

Manifestly, the tortious acts attributed to the appellant in the manufacture and labeling of the hammer occurred at the place of manufacture in Illinois and, as in *Feathers*, are wholly insufficient to satisfy the requirement of paragraph 2 that the "tortious act" be one committed "within" this State.[16] The Appellate Division, nevertheless, sustained jurisdiciton on the theory that Estwing's "circulation" in New York of a hammer mislabeled as unbreakable—thereby creating, as that court put it, a continuing condition of hazard wherever the article was sold—itself constituted the commission of a tortious act here. We cannot accept this reasoning. The mere fact that a product defectively manufactured and misleadingly labeled

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[16] Quite obviously, cases such as *Thomas* v. *Winchester* (6 N. Y. 397), *Smith* v. *Peerless Glass Co.* (259 N. Y. 292) and *Greenberg* v. *Lorenz* (9 N. Y. 2d 195)—cited in the concurring opinion of the Chief Judge (pp. 471-472)—which deal solely with the question of "liability", have nothing to do with the problem of "jurisdiction". As we have already made clear in our discussion of the *Feathers* case (*supra*, pp. 459-460), we are concerned on these appeals only with the question of the court's jurisdiction over the defendant and not at all with the issue of its liability.

in one state is marketed and sold in another cannot serve to change the place where the original tortious acts were committed or to create a new tortious act. The tortious conduct charged to the appellant consists solely of its acts in manufacturing an assertedly defective hammer and in attaching to it a false label, both of which unquestionably took place in Illinois. Accordingly, as the trial judge correctly concluded, jurisdiction cannot be sustained under paragraph 2.

However, the question remains whether jurisdiction may be upheld under paragraph 1 on the ground that the appellant "transact[ed] * * * business within the state" and that the pleaded cause of action is one "arising" therefrom. It is clear that paragraph 1 is not limited to actions in contract; it applies as well to actions in tort when supported by a sufficient showing of facts. (See N. Y. Advisory Comm. Rep. [N. Y. Legis. Doc., 1958, No. 13], p. 39; see, also, Notes of Commissioners on Uniform State Laws, Uniform Laws Ann., vol. 9B [Supp. 1964], p. 78.)

The record, although conflicting in some respects, does establish certain facts as to which there is no substantial dispute—namely, that the appellant has shipped substantial quantities of its products into this State as the result of solicitation here through a local manufacturer's representative and through catalogues and advertisements and that the injury-causing hammer, purchased from a New York dealer, was one of such products. The Appellate Division, in view of its conclusion predicated on paragraph 2, apparently found it unnecessary to consider the applicability of paragraph 1. But in its opinion the court did call attention to facts which demonstrated that the appellant transacted business here and which, in its view, provided the requisite nexus with this State demanded by due process.

We hold that the appellant's activities in this State are sufficient to satisfy the statutory criterion of transaction of business as well as the constitutional requirement of "minimum contacts". (See *International Shoe Co.* v. *Washington*, 326 U. S. 310, 319-320, *supra; McGee* v. *International Ins. Co.*, 355 U. S. 220, 223, *supra.*) For the reasons we gave in rejecting a similar contention in the *Longines-Wittnauer* case (*supra*, pp. 456-458), we do not deem it determinative, as urged by the appellant, that the formal execution of its sales contracts may have occurred in Illinois rather than New York. Nor is it a controlling consideration that the actual injury happened to take place in Connecticut, since the cause of action asserted is clearly one "arising from" the purposeful activities engaged in by the appellant in this State in connection with the sale of its products in the New York market.

In sum, then, the Appellate Division was in error in holding paragraph 2 applicable; nevertheless, on the strength of paragraph 1, we affirm its order sustaining jurisdiction over the appellant.

1. In *Longines-Wittnauer* v. *Barnes & Reinecke*, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

2. In *Feathers* v. *McLucas*, the order of the Appellate Division should be reversed, the order of Special Term reinstated, with costs in this court and in the Appellate Division, and the certified question answered in the negative.

3. In *Singer* v. *Walker*, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

VAN VOORHIS, J. (concurring). I concur in Judge FULD's opinion in *Longines-Wittnauer Watch Co.* v. *Barnes & Reinecke* and in the result in the other two cases. In *Feathers* v. *McLucas*, I agree that CPLR 302 is not broad enough to confer jurisdiction under the facts of that case, but I also consider it to be probable that, in adopting that section, the New York State Legislature expanded our jurisdiction over nonresidents near to the limit permitted by the due process clause. In *Hanson* v. *Denckla* (357 U. S. 235) the Supreme Court indicated that all United States constitutional restrictions on the personal jurisdiction of state courts have not been removed. Each state is likely to go as far as the Constitution permits in assuming jurisdiction over nonresidents, and it is appropriate that they should be restrained in doing so by some modern Federal rule of constitutional interpretation analogous to but in substitution for that of *Pennoyer* v. *Neff* (95 U. S. 714). That time-honored decision held the balance between the states for a long time. It has now been superseded by *International Shoe Co.* v. *Washington* (326 U. S. 310) and *McGee* v. *International Life Ins. Co.* (355 U. S. 220) but, as pointed out in Judge FULD's opinion, those cases still have left largely undefined the constitutional area for state exercise of jurisdiction over nonresidents. It is desirable that this constitutional area become defined, as it probably will be by individual cases in course of time. I am fortified in my view that the court is correct in its interpretation of CPLR 302 in *Feathers* v. *McLucas* by the circumstance that a broader interpretation would be likely to conflict with the Federal Constitution.

In *Singer* v. *Walker*, the liability of the defendant, if any, is likely to depend upon the extent to which the courts of our State adopt the principles of the new legal doctrine known as products liability. Liability under that doctrine depends upon whether the manufacture of this

geologist's hammer can be subjected to damages for introducing this appliance with or without fault into the stream of commerce, with the reasonable anticipation that it would be resold in New York State (*MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382; see, also, Gillam, Products Liability in a Nutshell, 37 Ore. L. Rev. 119, 153; Prosser, The Assault Upon the Citadel [Strict Liability to the Consumer], 69 Yale L. J. 1099, 1106; Strict Products Liability and the Bystander, 64 Col. L. Rev. 916, 928; James, Products Liability II, 34 Tex. L. Rev. 192, 194, n. 10; Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L. J. 499; Morris, Hazardous Enterprises, 61 Yale L. J. 1172; Comments, 9 Vill. L. Rev. 174; 49 Corn. L. Q. 354; Reed, Products Liability and the Privity Rule, Circa 1964, 7 So. Tex. L. J. 118, 119; *Goldberg* v. *Kollsman Instrument Corp.*, 12 N Y 2d 432; *Randy Knitwear* v. *American Cyanamid Co.*, 11 N Y 2d 5, per FULD, J.). Such proposed extensions of *MacPherson* v. *Buick Motor Co.* (217 N. Y. 382, *supra*) and of the food implied warranty cases (cf. *Rinaldi* v. *Mohican Co.*, 225 N. Y. 70; *Ryan* v. *Progressive Grocery Stores*, 255 N. Y. 388; *Greenberg* v. *Lorenz*, 9 N Y 2d 195) pertain to one of the modern battlefields of the law. Neither courts nor textwriters are certain whether these theories of liability sound chiefly in contract or in tort. The extent of such liability, if it goes beyond negligence (*MacPherson* v. *Buick Motor Co.*, *supra*) or express warranty (see concurring opinion per FROESSEL, J., in *Randy Knitwear* v. *American Cyanamid Co.*, 11 N Y 2d 5, 16, *supra*) remains to be determined by the facts of particular cases yet to arise, under the familiar process of inclusion and exclusion. The present case (*Singer* v. *Walker*) may become one of such decisions, but the Court cannot determine the question of liability—and does not purport to do so at this stage of the litigation—unless jurisdiction be obtained. I subscribe to the view that in

order to ascertain whether the New York courts have jurisdiction it is not necessary to determine the existence or theory of liability under these circumstances in advance of trial. Unless jurisdiction is upheld, the question of liability cannot be decided. I think that, without prejudice to the determination of questions of liability at the trial, enough has been shown to indicate existence of a substantial controversy which, if resolved in plaintiff's favor on the facts and the law, would warrant the assumption of jurisdiction under CPLR 302 (subd. [a], par. 1). The analogy is pertinent that in cases where jurisdiction is obtained by attachment, the affidavits to procure which must show "that there is a cause of action" (CPLR 6212 subd. [a]) the power "to grant an attachment does not depend upon predetermination of the merits of the action or plaintiff's prospects of success therein" (10 Carmody-Wait, New York Practice, p. 116). Although evidentiary facts must be shown, it has been said by this Court that "The jurisdiction to grant an attachment does not, we think, involve a preliminary determination by the officer to whom application for the writ is made, whether in law the case presented by the complaint will entitle the plaintiff to the relief he asks" (*Van Camp* v. *Searle*, 147 N. Y. 150, 161). "It is enough that as to a major portion of their claim we cannot say as matter of law on this record that the plaintiffs must ultimately be defeated (see *American Reserve Ins. Co.* v. *China Ins. Co.*, 297 N. Y. 322, 325)." (*Plesh* v. *Banque Nationale de le Republic d'Haiti*, 298 N. Y. 573, 575.) Since products or some related form of liability (if established) would mean that the infant plaintiff's injuries arose out of the particular business transaction engaged in by the nonresident manufacturer in the purposeful circulation of this hammer in the stream of commerce in New York State, enough has been shown prima facie to warrant upholding jurisdiction to try this issue.

Chief Judge DESMOND (concurring). In *Singer* v. *Walker*, I concur for affirmance but I emphatically disagree with the majority's holding that these papers do not charge the commission by defendant of a tortious act within this State. To my eye the record plainly establishes not one but both bases of jurisdiction described in CPLR 302, that is, that defendant transacted business within this State within the meaning of paragraph 1 of subdivision (a), and also that he committed a tortious act within this State under paragraph 2 of subdivision (a).

The damage being done by this decision is not to the plaintiff and his cause but to the second part of section 302 (subd. [a], par. 2: "commits a tortious act within the state") which is being given a restrictive meaning not required or justified, contrary to the plain language of the statute itself and its evident purpose and to the relevant decisions in this Court and in courts of other states.

The statutory language (302, subd. [a], par 2), "commits a tortious act within the state", is taken verbatim from Illinois law (Ill. Rev. Stat. ch. 110, § 17). It has the same meaning as the phrases "tortious conduct" in the Connecticut and North Carolina statutes (Conn. Gen. Stat. Rev. § 33-411, subd. [c] [1959]; N. C. Gen. Stat. §55-145, subd. [a], par. [4] [1955]) and "part of a tort" in the Minnesota, Texas, Vermont and West Virginia laws (Minn. Stat. Ann., § 303.13, subd. 1, par. [3] [1964 Supp.]; Tex. Civ. Stat., art. 2031b, § 4 [1959]; Vt. Stat. Ann. tit., 12, § 855; W. Va. Code Ann. [1961], § 3083). All reflect the idea that various separate acts or omissions may together make out a tort. For instance, the totality of an actionable tort such as is charged here (involving manufacturer's products liability) consists of three elements: defective manufacture, distribution to purchaser, and a resulting injury. Each of these is a "tortious act" or,

in other words, a "part of a tort". This complaint charges both negligence and breach of warranty. How it can be, factually or conceptually, that Estwing committed no "tortious act" in this State when, directly and without intervening vendors or distributors, it sent the mislabeled and defective hammer into New York for sale is beyond my understanding. True, the whole tort was not committed here since the manufacture and the origin of the shipment were in Illinois and the resulting physical injury was in Connecticut, but a tortious act in New York is nevertheless spelled out plainly in these papers. Such is the holding in *Gray* v. *American Radiator & Sanitary Corp.* (22 Ill. 2d 432 [1961]) construing the Illinois statute whose language was copied directly into our section 302 (sub. [a], par. 2). Singer's is a much stronger case than *Gray* for the application of such a long-arm statute since the defendant manufacturer in *Gray* did not directly send its product into Illinois at all. The *Gray* rationale is simply this: when a manufacturer purposefully sends its product into the forum state or when his conduct of his business is such that he contemplates the delivery of his product in a forum state he is guilty of a tortious act in the forum State if the product is defective in such manner that the manufacturer is libel in tort. Such an interpretation of the statute is entirely fair and reasonable, well suited to today's ways of doing business and surely not outside the constitutional permissions explained in *McGee* v. *International Life Ins. Co.* (355 U. S. 220) and *Hanson* v. *Denckla* (357 U. S. 235). When our Legislature adopted the language of the Illinois Legislature it presumably adopted with it the construction given the statutory language by the Illinois courts in *Gray* (*Shapiro* v. *United States*, 335 U. S. 1, 16-20; *Hoffer Bros* v. *Smith*, 148 Va. 220, 227).

For background and illumination of the phrase "commits a tortious act within the state" let us look at New York decisions before section 302 was adopted. The idea that sending into the market, by a manufacturer, a dangerous product or one carelessly labeled is a tortious act and part of an actionable tort goes way back in this state's decisions to *Thomas* v. *Winchester* (6 N. Y. 397) and has gradually been broadened to cover articles which are not inherently dangerous but because of their defects are dangerous when put to an intended use (*Smith* v. *Peerless Glass Co.*, 259 N. Y. 292; *Genesee County Patrons Fire Relief Assn.* v. *Sonneborn Sons*, 263 N. Y. 463; *O'Connell* v. *Westinghouse X-Ray Co.*, 288 N. Y. 486; *Noone* v. *Perlberg, Inc.*, 294 N. Y. 680; *Markel* v. *Spencer*, 5 N Y 2d 958; and see the nonprivity warranty cases such as *Greenberg* v. *Lorenz*, 9 N Y 2d 195). This appeal, therefore, presents the simple and single question: Was that tortious act "committed" in New York State? Sending the hammer here into our state was, if the complaint's allegations be true, tortious. That the act was committed here is a physical fact, and the words of our statute refer to actualities, not "some esoteric concept derived from subtle and theoretic analysis" (to borrow some phraseology from *Old Colony R. R. Co.* v. *Commissioner*, 284 U. S. 552, 561).

The cases from other states with statutes similar to ours apply the meaning and application we are suggesting to the "tortious act" and "tort in whole or in part" language (*Gray* v. *American Radiator & Sanitary Corp.*, 22 Ill. 2d 432, *supra*; *Deveny* v. *Rheem Mfg. Co.*, 319 F. 2d 124; *Smyth* v. *Twin State Improvement Corp.*, 116 Vt. 569; *O'Brien* v. *Comstock Foods*, 123 Vt. 461; *Atkins* v. *Jones & Laughlin Steel Corp.*, 258 Minn. 571; *Putnam* v. *Triangle Pub.*, 245 N. C. 432). *Rufo* v. *Bastian-Blessing Co.* (405 Pa. 12) might seem to be more restrictive but on analysis the case turns out to be one like *Feathers* v. *McLucas* in

which our court is today holding that the statute does not reach far enough to include it. I find nothing to the contrary in any of the decisions cited by appellant here, nor anything in any of our legislative material including the reports of the Advisory Committee, to suggest that it was not the New York Legislature's intent to apply section 302 (subd. [a], par. 2) to a situation like the one disclosed here. The order should be affirmed, with costs, and the certified question answered in the affirmative.

For about the same reasons, I vote to affirm in *Feathers* v. *McLucas*. I see no necessity or warrant for restricting the statutory language "tortious act within the state" so narrowly as to defeat the apparent legislative purpose and deprive our citizens of the intended benefits of the statutory plan.

In Longines-Wittnauer: Order affirmed, with costs. Question certified answered in the affirmative.

Chief Judge DESMOND and Judges DYE, VAN VOORHIS, BURKE, SCILEPPI and BERGAN concur.

In Feathers v. McLucas: Order of Appellate Division reversed and that of Special Term reinstated, with costs in this court and in the Appellate Division. Question certified answered in the negative.

Judges DYE, BURKE, SCILEPPI and BERGAN concur with Judge FULD; Judge VAN VOORHIS concurs in result in a separate opinion; Chief Judge DESMOND dissents and votes to affirm.

In Singer v. Walker: Order affirmed, with costs. Question certified answered in the affirmative.

Judges DYE, BURKE, SCILEPPI and BERGAN concur with Judge FULD; Judge VAN VOORHIS and Chief Judge DESMOND concur in separate opinions.

Order of Court of Appeals

No. 366

FREDERICK F. SINGER, individually and as guardian and parent of MICHAEL SINGER, an infant,

Respondent,

vs.

ALAN WALKER, &c.,

Defendant,

AND

ESTWING MANUFACTURING CO., INC., &c.,

Appellant.

BE IT REMEMBERED, That on the 22nd day of September in the year of our Lord one thousand nine hundred and sixty-four, Estwing Manufacturing Co., Inc., &c., the appellant—in this cause, came here unto the Court of Appeals, by Zelby & Burstein, its attorneys, and filed in the said Court a return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Frederick F. Singer, individually and as guardian and parent of Michael Singer, an infant, the respondent—in said cause, afterwards appeared in said Court of Appeals by Harry L. Koenig, his attorney.

Which said return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Abraham Burstein, of counsel for the appellant—, and by Mr. Harry L. Koenig, of counsel for the respondent, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court herein be and the same hereby is affirmed, with costs. Question certified answered in the affirmative.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, First Judicial Department, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs. Question certified answered in the affirmative, as aforesaid.

And hereupon, as well the return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, First Judicial Department, before the Justices thereof according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the
State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, May 27, 1965.

[SEAL]

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No. 473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

FREDERICK F. SINGER, individually and as guardian and parent of MICHAEL SINGER, an infant,

Respondents,

against

ALAN WALKER, doing business under the firm name and style of WALKER'S MINERALS at 799 Lexington Avenue, New York City,

Defendant,

and

ESTWING MANUFACTURING CO. INC., also known as ESTWING MANUFACTURING COMPANY,

Petitioner.

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE CONSTITUTIONALITY OF SECTIONS 302 AND 10003 OF THE CIVIL PRACTICE LAW AND RULES OF THE STATE OF NEW YORK WHICH BECAME LAW ON SEPTEMBER 1, 1963

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Long Island City, New York.

HARRY L. KOENIG,
Of Counsel.

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Respondents respectfully oppose the granting of the Writ of Certiorari to review the unanimous decision of the Court of Appeals of the State of New York which affirmed the unanimous decision of the Supreme Court of the State of New York, Appellate Division, First Department, which reversed an order granted by a Justice presiding at Special Term, Part I of the Supreme Court of the State of New York, County of New York, vacating the service of process upon petitioner.

The Record Below

The Appendix presented by petitioner with its petition contains no part of the record on appeal which had been certified to and examined by the Justices of the Appellate Division and the Justices of the Court of Appeals before rendering their decision; with the exception of the order and opinion at Special Term. The said record on appeal included the following papers:

1. Notice of Appeal dated December 3, 1963.
2. Order of Mr. Justice Jacob Markowitz dated November 21, 1963.
3. Notice of Motion dated October 7, 1963.
4. Affidavit of Norman Estwing sworn to October 2, 1963.
5. Affidavit of Nathan E. Zelby sworn to October 7, 1963.
6. Photo-copy of report of Hon. Thomas B. Galligan, Special Referee dated December 13, 1961.
7. Photo-copy of decision of Hon. Edgar J. Nathan, Jr., Official Referee dated April 17, 1962.
8. Photo-copy of order of Hon. Edgar J. Nathan, Jr., Official Referee dated May 16, 1962.
9. Photo-copy of plaintiffs' complaint verified September 12, 1963.
10. Affidavit of Harry L. Koenig sworn to October 15, 1963.
11. Reply affidavit of Nathan E. Zelby sworn to October 23, 1963.
12. Transcript of testimony taken before Hon. Edgar J. Nathan, Jr., on March 6, 1962.

The foregoing papers filed under Index No. 15655/63 with Clerk of Supreme Court, New York County.

13. Transcript of testimony taken before Hon. Thomas B. Galligan on November 29, 1961, filed under Index No. 4667/1961.

14. Transcript of testimony taken before Hon. Thomas B. Galligan on October 30, 1961 in the matter of Manganaro, etc., Plaintiffs vs. Estwing, etc., Defendant, filed under Index No. 3556/1961.

However, petitioner's "Appendix to Appellant's Brief" in the Court of Appeals, contains a printed copy of the foregoing record, with the exception of the transcript of testimony hereinbove shown (Items 12, 13 and 14). Respondents assume that petitioner's reference to "RA" in its "Statement" refers to its "Appendix to Appellant's Brief" in Court of Appeals. (Respondents will refer to the same pages of such appendix as RA.)

Questions Presented and Statutes Involved

Were sections 302, 10003 and 313 (service without the state giving personal jurisdiction) of the CPLR constitutionally valid as interpreted by the highest Court of the State of New York, validating the service of process upon petitioner? It is respondents' position that the language of the questions at issue presented by petitioner excludes many of the pertinent facts contained in the record herein.

Statement

The summons is dated and the complaint was verified on September 12, 1963. It was served on the president of the defendant Estwing on September 19, 1963 at Rockford, Illinois. The effective date of the CPLR was September 1, 1963. This was a new action. The old action had been

dismissed by an order of Mr. Justice Edgar J. Nathan, Jr., dated and entered May 16, 1962. The old action had been commenced before the effective date of the CPLR (RA 42-43). The complaint contains two causes of action, one in breach of warranty and the other in negligence (A, p. 17).* It alleges that on or about February 24, 1960, there was purchased for the infant plaintiff from defendant Walker, who operates Walker's Minerals at 799 Lexington Avenue, in the Borough of Manhattan, a geologist's hammer contained the words: "Unbreakable Tools Estwing Mfg. Co., Rockford, Ill." Plaintiffs are and have been residents of the County and State of New York. The infant plaintiff, then 10 years of age and his father, on April 17, 1960 were in Connecticut on a field trip collecting specimens of rock. The hammer broke while being wielded in rock breaking; causing a piece of metal from the hammer to penetrate Michael's right eye, with resultant injury to and the eventual loss of his right eye. He was hospitalized at Columbus Presbyterian Hospital, located in the County of New York and was treated by a local surgeon. The hammer in question was examined by a metallurgical expert located in the County of New York. All witnesses who could testify in support of plaintiffs' action are all located within the jurisdiction of the Supreme Court of the State of New York, County of New York (RA 43-44). It would have involved respondents in assuming a heavy financial burden to press the suit in Illinois (RA 43-44). The hammer had been manufactured in Illinois by petitioner and shipped f.o.b. Rockford, Illinois, to the New York dealer who had purchased it by direct mail order, using a catalogue which had been mailed to him by petitioner (from Mr. Justice Breitel's opinion in the Appellate Division, A, p. 17). Petitioner "does a great deal of business directly in the New York area, sending its salesmen and its catalogues into the city. . . ." (from Mr. Justice Breitel's opinion in the Appellate Division, A, p. 24).

* Petitioner's appendix designated as "A".

"The record, although conflicting in some respects, does establish certain facts as to which there is no substantial dispute—namely, that the appellant has shipped substantial quantities of its products into this State as the result of solicitation here through a local manufacturer's representative and through catalogues and advertisements and that the injury-causing hammer, purchased from a New York dealer, was one of such products." (from Mr. Justice Fuld's opinion in the Court of Appeals, A, p. 46); ". . . the cause of action asserted is clearly one 'arising from' the purposeful activities engaged in by the appellant in this State in connection with the sale of its products in the New York market" (from Mr. Justice Fuld's opinion in the Court of Appeals, A, p. 47); ". . . the infant plaintiff's injuries arose out of the particular business transaction engaged in by the nonresident manufacturer in the purposeful circulation of this hammer in the stream of commerce in New York State . . ." (from the concurring opinion of Mr. Justice Van Voorhis in the Court of Appeals, A, p. 50); ". . . the record plainly establishes not one but both bases of jurisdiction described in CPLR 302, that is, that defendant transacted business within this State within the meaning of paragraph 1 of subdivision (a), and also that he committed a tortious act within this State under paragraph 2 of subdivision (a)" (from the concurring opinion of Chief Justice Desmond in the Court of Appeals, A, p. 51).

The extent of petitioner's business operations in the New York market is fully documented and analyzed in the affidavit of Harry L. Koenig, respondents' attorney (RA 44-51). Mr. Justice Nathan's finding that petitioner "does less than 1% of its business in this state" is an obvious typewritten or mathematical error (RA 46). It is more likely that Estwing's total shipments into New York approximated over 25% of their total shipments throughout the country (RA 50-51). The extent of Est-

wing's connections with New York is further documented in the findings of Hon. Thomas B. Galligan, Special Referee (RA 23, 24 and 25).

Reasons for Denying the Writ

There is no point in laboring the fact that the Court of Appeals of the State of New York as well as the Appellate Division of the Supreme Court, First Department have decided that the process in question is valid and that New York State will entertain the suit. The well written opinions in the Appellate Courts below fully demonstrate the reasons why the Courts validated the service of process.

From Mr. Justice Fuld's opinion in the case at bar (A26-27):

> "The standard for assessing the irreducible minimum forum activities constitutionally requisite to subject foreign corporations and nonresident individuals to personal jurisdiction was reformulated in the cases of International Shoe Co. v. Washington (326 U. S. 310) and McGee v. International Life Ins. Co. (355 U. S. 220) . . ."
>
> "In place of the former rigid tests of 'residence' and 'doing business', the Supreme Court, in International Shoe, substituted the flexible requirement that a nonresident defendant, against whom a judgment in personam is sought in the forum state, be shown merely to 'have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' (326 U. S., at p. 316). And, in McGee, the court upheld the power of a state to subject a foreign corporation to suit in its courts on the basis simply of an isolated insurance contract 'which had substantial connection with that State' (355 U. S., at p. 223)."

This Court pointed out in *Hanson* v. *Denckla* (357 U. S. 235):

> ". . . It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." (357 U. S., at p. 253)

Mr. Justice Breitel in the case at bar stated:

> "Of paramount importance, no doubt is the fact that an instrument dangerous to human life and health, if defective, is involved. Due process considerations would undoubtedly be more restrictive if there were involved simply a dispute of commercial dimensions between parties to a commercial contract. Where one introduces into a state a dangerous instrument the expectation of responsibilities should be greater . . ." (A25)

From Mr. Justice Fuld's opinion in the instant case:

> "We hold that the appellant's activities in this State are sufficient to satisfy the statutory criterion of transaction of business as well as the constitutional requirement of 'minimum contacts'. (See International Shoe Co. v. Washington, 326 U. S. 310, 319-320, supra; McGee v. International Ins. Co., 355 U. S. 220, 223, supra.) For the reasons we gave in rejecting a similar contention in the Longines-Wittnauer case (supra, pp. 456-458), we do not deem it determinative, as urged by the appellant, that the formal execution of its sales contracts may have occurred in Illinois rather than New York. Nor is it a controlling consideration that the actual injury happened to take place in Connecticut, since the cause of action asserted is clearly one 'arising from' the purposeful activities engaged in by the appellant in this State in connection with the sale of its products in the New York market." (A47)

From Mr. Justice Van Voorhis' concurring opinion in the instant case:

> "Since products or some related form of liability (if established) would mean that the infant plaintiff's injuries arose out of the particular business transaction engaged in by the nonresident manufacturer in the purposeful circulation of this hammer in the stream of commerce in New York State, enough has been shown prima facie to warrant upholding jurisdiction to try this issue." (A50)

From the opinion of Chief Judge Desmond, in the instant case:

> ". . . Singer's is a much stronger case than Gray for the application of such a long-arm statute since the defendant manufacturer in Gray did not directly send its product into Illinois at all . . ." (A52)

From *McGee* v. *International Life Ins. Co.*, 355 U. S. 220, page 223:

> "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State . . . It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable . . . Often the crucial witnesses . . . will be found in the insured's locality."

From *Travelers Health Assn.* v. *Virginia*, 339 U. S. 643, page 648:

> ". . . we rejected the contention, based on the *Benn* case among others, that a state's power to regulate

must be determined by a 'conceptualistic discussion of theories of the place of contracting or of performance.' . . . And in *International Shoe Co.* v. *Washington,* 326 U. S. 310, 316, this Court, after reviewing past cases, concluded: 'due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." ' "

Page 649:

". . . In addition, suits on alleged losses can be more conveniently tried in Virginia where witnesses would most likely live and where claims for losses would presumably be investigated. Such factors have been given great weight in applying the doctrine of *forum non conveniens.* See *Gulf Oil Co.* v. *Gilbert,* 330 U. S. 501, 508. And prior decisions of this Court have referred to the unwisdom, unfairness and injustice of permitting policyholders to seek redress only in some distant state where the insurer is incorporated.[8] The Due Process Clause does not forbid a state to protect its citizens from such injustice."

From *Watson* v. *Employers Liability Corp.,* 348 U. S. 66, page 72:

"Louisiana's direct action statute is not a mere intermeddling in affairs beyond her boundaries which are no concern of hers. Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. Serious injuries may require treatment in Louisiana homes or hospitals by Louisiana doctors. The injured may be destitute. They may be compelled to call upon friends, relatives, or the public for help. Louisiana

has manifested its natural interest in the injured, by providing remedies for recovery of damages. . . . Moreover, Louisiana courts in most instances provide the most convenient forum for trial of these cases. But modern transportation and business methods have made it more difficult to serve process on wrongdoers who live or do business in other states. In this case efforts to serve the Gillette Company were answered by a motion to dismiss on the ground that Gillette had no Louisiana agent on whom process could be served. If this motion is granted, Mrs. Watson, but for the direct action law, could not get her case tried without going to Massachusetts or Illinois although she lives in Louisiana and her claim is for injuries from a product bought and used there. What has been said is enough to show Louisiana's legitimate interest in safeguarding the rights of persons injured there. In view of that interest, the direct action provisions here challenged do not violate due process."

What this Court said in the foregoing cases is applicable to the case at bar.

Distinguishing Petitioner's Cases

As to *Hanson* v. *Denckla*, 357 U. S. 235, from page 251:

"However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him. See International Shoe Co. v. Washington. . . .

We fail to find such contacts in the circumstances of this case. The defendant trust company has no office in Florida, and transacts no business there. None of the trust assets has ever been held or administered in Florida, and the record discloses no solicitation of

business in that State either in person or by mail. Cf. International Shoe Co. v. Washington, 326 U. S. 310; McGee v. International Life Ins. Co., 355 U. S. 220; Travelers Health Assn. v. Virginia, 339 U. S. 643.

The cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State. In that respect, it differs from McGee v. International Life Ins. Co., 355 U. S. 220, and the cases there cited. In McGee, the nonresident defendant solicited a reinsurance agreement with a resident of California."

Erlanger v. *Cohoes Fibre Mills* (239 F. 2d 502 [4th Cir. 1956]), is distinguished by Mr. Justice Breitel in his opinion in the instant case (A23-24). There is little analogy between Erlanger, Hanson and the case at bar.

Pendzimas v. *Eastern Metal Products Corp.*, 218 F. Supp. 524 (D. Minn. 1961), is clearly not in point. It was a commercial transaction involving a single sale of merchandise.

Long v. *Victor Products Corp.*, 297 F. 2nd 577 (8th Cir. 1961), is clearly not in point. The decision is based on the old concepts of defining "doing business". It did not involve the interpretation of a state statute enlarging jurisdiction such as in the instant matter.

In *Insull* v. *New York World Telegram Corp.*, 172 Fed. Supp. 615 (N. D. Ill., 1959), a libel suit, the court decided that a "foreign publishing corporation is not transacting business in a state because it ships its periodicals into the state to its subscribers . . .". This situation is clearly distinguishable from the case at bar, where the foreign corporation manuafctured a product which possessed dangerous propensities and was falsely labelled inducing its use by a resident of New York who purchased it in New York from a New York dealer, who in turn had purchased the product from defendant—resulting in serious injury to

plaintiffs. It is noteworthy that subdivision (2) of § 302 of the CPLR excludes "a cause of action for defamation of character . . .".

Kaye-Martin v. *Brooks*, 267 F. 2d 394 (7th Cir., 1959), cert. den. 361 U. S. 832, involved a commercial transaction that had absolutely no connection with the state of Illinois. From page 398:

> "On this record as it comes to us it is clear that those 'minimal contacts' which are an absolute prerequisite to personal jurisdiction of the courts of Illinois over a defendant are totally lacking as to Brooks . . ."

Groback v. *Addo Machine Corp.*, 16 Ill. 2d 426, is clearly not in point. It involved a commercial transaction between plaintiff and defendant. The Court held that defendant did not transact any business in the state. When citing *Groback*, petitioner asserts that its total shipments into New York State amounted to less than 1% of its total business. This statement is clearly erroneous. This statement in the findings of Mr. Justice Nathan was inadvertently made and is mathematically incorrect as fully established by the record.

§ 302 Is a Procedural Statute and May Be Applied Retroactively

Mr. Justice Fuld in his opinion covered the question of retroactivity (A29-31). Among other cases, he cites *McGee* v. *International Life Ins. Co.*, *supra* and the very recent case of *United States* v. *First Nat. City Bank*, 379 U. S. 378, 85 S. Ct. 528; and *Simonson* v. *International Bank*, 14 N. Y. 2d 281, 290, which was cited by this Court in *United States* v. *First Nat. City Bank*, *supra*.

Hasse v. *American Photograph Corp.*, 299 F. 2d 666 (10th Cir. 1962) and *Guerra de Chapa* v. *Allen*, 119 F. Supp. 129 (S. D. Texas 1954), cited by petitioner, in-

volved non-resident motorist statutes. The provisions of such statutes have been construed to apply to "future" situations. The motorist usually consents that a highway commissioner or someone in the state will accept service of process for him. The Courts have held that the motorist could not have consented if such a statute was not in effect at the time when the motorist was involved in the State.

Jennings v. *McCall Corporation,* 320 F. 2d 64 (8th Cir. 1963), cited by petitioner, is not in point. There the Court held that a foreign corporation was not amenable to suit in the State on a cause of action which did not arise out of any business conducted by it in the State (as interpreted under Missouri law) although "neither party seriously contends that jurisdiction is precluded in this case by federal due process requirements . . .".

Summary

From *McGee* v. *International Life Ins. Co., supra* (pp. 222-3):

> "Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."

It is significant that petitioner has made every attempt to minimize its activities in the State of New York, on the assumption, no doubt, that if it was "active" in the State then it would be obliged to defend the instant lawsuit in the State. Can it be seriously contended that petitioner is being deprived of its "property without due process of law" when it has been given every opportunity to defend the instant lawsuit in the State where it has been actively engaged for many years in selling its products. The New York Legislature, in its wisdom, has seen fit to follow this Court in enlarging its jurisdiction against foreign corporations as provided in § 302 of the CPLR and related sections. The highest Court of the State of New York in the suit at bar has interpreted these statutes to give full force and effect to the intent of the Legislature of the State of New York and to the law as interpreted by this Court. Respondents are consumers who were seriously injured when they used one of Estwing's hammers purchased from an Estwing dealer in New York. The injured persons live in New York; all their witnesses live in New York; nevertheless, petitioner has been fighting through all the Courts of the State of New York and now up to the Supreme Court of the United States in an effort to convince—that this suit rightfully belongs in the Courts of Illinois—that he, the manufacturer, would be deprived of his property without due process of law—if he is required to defend this action in the Courts of New York. There is no logic to his contention. It would seem to the writer that it would be more logical to hold that respondents would be deprived of their property without due process of law if they are obliged to undertake and assume the financial burden of transporting themselves and their witnesses to the State of Illinois.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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